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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1079

DOBBS HOUSES, INC.,
Petitioner,

v.

MRS. FANNIE M. SANDERS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Fifth Circuit

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Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Fifth Circuit

Dobbs Houses, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on August 28, 1970 (*infra*, p. A-13).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at ... F. 2d ..., 2 FEP Cases 942 (*infra*, pp. A-4–A-11). The opinion of the United States District Court for the Northern District of Georgia, Atlanta Division, is reported at ... F. Supp. ..., 2 FEP Cases 940 (*infra*, pp. A-2–A-3).

JURISDICTION

The judgment of the Court of Appeals was entered on August 28, 1970. A duly filed Petition for rehearing was denied on October 26, 1970. The jurisdiction of this Court rests on 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether 42 U. S. C. § 1981, which provides that "[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens," prohibits racial discrimination in private employment.

2. Whether, assuming that 42 U. S. C. § 1981 bars racial discrimination in private employment, it has been superseded in its specific application to that wrong by the later enactment of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-5 (1970) a comprehensive congressional plan to end racial discrimination in employment based upon "race, color, religion, sex, or national origin."

STATUTES INVOLVED

1. 42 U. S. C. § 1981 provides that:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

2. Title VII of the Civil Rights Act of 1964 (78 Stat. 241, 253-66, 42 U. S. C. §§ 1971, 2000e-2000e-15), in relevant part, is set forth (*infra*, pp. A-14–A-36).

STATEMENT

I. FACTS

Respondent herein, Mrs. Fannie M. Sanders, was discharged by her employer Dobbs Houses, Inc., the Petitioner herein, for stealing food. On March 5, 1968, she formally complained to the Equal Employment Opportunity Commission (EEOC) pursuant to Title VII of the Civil Rights Act of 1964,[1] that the charges against her had been false and that she was discharged solely because she was a Negro (p. A-1, *infra*). On May 12, 1969, the EEOC notified Mrs. Sanders that it had been unable to obtain voluntary conciliation and advised her that she had thirty days to commence a civil action pursuant to § 706 (e) of Title VII (p. A-1, *infra*). Forty-six days later, she instituted this action for an injunction, backpay and an offer of reinstatement under Title VII. Dobbs Houses moved the court to dismiss the complaint for failure to meet the thirty-day statute of limitations[2] (p. A-1, *infra*). Sanders thereupon moved the court for leave to amend her complaint to state jurisdiction under 42 U. S. C. § 1981. The trial judge allowed the amendment, subject to objection, but dismissed the amended complaint on the grounds that the statute of limitations barred the Title VII action and the § 1981 claim could not be maintained against a private employer in the absence of some element of State action (pp. A-2–A-3, *infra*).

II. THE DECISION OF THE DISTRICT COURT

The complaint was filed on June 27, 1969 alleging jurisdiction under 28 U. S. C., § 1343 and attempting to set forth a cause of action under 42 U. S. C., § 2000e, et seq.

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[1] 42 U. S. C. A., § 2000e-5 (1970) (pp. A-14–A-36, *infra*).

[2] 42 U. S. C. A., § 2000e-5 (*e*) (1970) (p. A-26, *infra*).

by alleging that the plaintiff, a Negro, was falsely accused of theft, threatened with criminal prosecution, and then fired, all in violation of the Equal Employment Opportunity Act. Upon the Defendant Dobbs Houses' motion to dismiss, the plaintiff, with leave of the court, subject to defendant's objections, amended her complaint to allege a cause of action arising under 42 U. S. C., §§ 1981, 1982 and 1983 with jurisdiction of the claim allegedly being present under § 1981. On the defendant's motion to dismiss the original complaint, the court ruled, contrary to the plaintiff's contentions, that the thirty-day statute of limitations contained in Title VII is mandatory and not directory and as the plaintiff had waited until forty-six days after the EEOC notified her conciliation efforts had failed before bringing suit she was banned from doing so by the statute of limitations (pp. A-26, *infra*).

As to the amended complaint, the court held that the damage claim the plaintiff attempted to set forth is clearly not authorized by § 1981 or by § 1982 and furthermore, in order to have a claim under § 1983, the discriminatory acts must have been done under color of State law. Since the plaintiff has alleged nothing to bring herself within the provision of any of these statutes, the court held it would be futile to allow the amendment. Accordingly, the Motion to dismiss was granted; the defendant's objections to the amendment of the complaint were sustained; and the order allowing amendment, subject to objection, was vacated.

III. THE DECISION OF THE COURT OF APPEALS

On appeal, the Court of Appeals reversed and remanded for trial. The court held that § 1981 prohibits private racial discrimination in employment relying on the Seventh Circuit's recent ruling in **Waters v. Wisconsin**

Steel Works, 427 F. 2d 476 (7th Cir. 1970) and stating that "[s]uch a conclusion was clearly forecast by the Supreme Court's opinion in **Jones v. Alfred Mayer Co.**, 392 U. S. 409, 88 S. Ct. 2186, 20 L. Ed. 2d 1189 (1968)" as § 1982 which was involved in the **Jones** case and § 1981 are both derived from § 1 of the Civil Rights Act of 1866.

The Court further held that § 1981 has not been pre-empted by Title VII again relying on **Waters**, *supra* and also relying on the ruling in **Jones**, *supra* that Title VII of the Civil Rights Act of 1968 did not repeal § 1982 by implication and the ruling in **Sullivan v. Little Hunting Park, Inc.**, 396 U. S. 229, 90 S. Ct. 400, ...: L. Ed. 2d ... (1970), that the Public Accommodations provisions of the Civil Rights Act of 1969 in no way impaired the sanction of § 1982. The court also noted that Congress rejected an amendment to Title VII that would have made it the exclusive federal remedy for employment discrimination.

Finally, the court held that an action for damages lies under § 1981.

REASONS FOR GRANTING THE WRIT

Because of the diversity of judicial opinion which has been precipitated by the questions herein presented, and because the area of civil rights and in particular, employment discrimination, has become so intense with litigation that an early final resolution to the questions presented herein is a must.

I

This action is based upon 42 U. S. C., § 1981, which in relevant part provides that "All persons within the jurisdiction of the United States shall have the same right in

every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . .'"[3]

The question of whether this section prohibits racial discrimination in private employment has provoked a diversity of judicial opinion with some courts holding that it supports an action,[4] and others that it does not.[5]

In deciding the issue of whether or not § 1981 prohibits discrimination in private employment, one first meets the question of whether or not discrimination must be under color of State law in order to be prohibited by said section. In answering this question, petitioner thinks that it is appropriate to look first at the legislative history of the Civil Rights Act of 1866.

In the first session of the Thirty-ninth Congress on December 13, 1965, a few days prior to word being received

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[3] There is some question as to whether § 1981 is derived from § 1 of the Civil Rights Act of 1866 or § 16 of the Act of 1870 as § 1981 appears to have been taken almost verbatim from § 16 of the 1870 Act. The legislative history reveals that § 1981 is actually Section 1977 of the Revised Statutes of 1874, an official codification of all prior acts. The origin of R. S. 1977 is cited as the Act of 31 May, 1870.

[4] **Clark v. American Marine Corp.**, 304 F. Supp. 603, 609-611 (E. D. La. 1969); **Washington, State of v. Baugh Construction Co.**, 313 F. Supp. 598 (W. D. Wash. 1969); **Central Contractors Assoc. v. IBEW, Local 46**, 312 F. Supp. 1388 (W. D. Wash. 1969); **Dobbins v. Local 212, IBEW**, 292 F. Supp. 413 (S. D. Ohio 1969); **Waters v. Wisconsin Steel Works**, *supra*.

[5] **Harrison v. American Can Company**, . . . F. Supp. . . ., 2 FEP Cases 1 (S. D. Ala. 1969); **Colbert v. H. K. Corp., Inc.**, 295 F. Supp. 1091 (N. D. Ga. 1968); **Kendrick v. American Bakery Co.**, . . . F. Supp. . . ., 1 FEP Cases 349 (N. D. Ga. 1968); **Norman v. Missouri Pacific R. R.**, . . . F. Supp. . . ., 1 FEP Cases 331 (E. D. Ark. 1968), remanded without reaching this question, 414 F. 2d 73 (8th Cir. 1969); **Culpepper v. Reynolds Metals Company**, 296 F. Supp. 1232 (N. D. Ga. 1968); remanded without reaching this question, 421 F. 2d 888 (5th Cir. 1970); **Smith v. North American Rockwell Corporation**, . . . F. Supp. . . ., 2 FEP Cases 561 (N. D. Okla. 1970).

that the Thirteenth Amendment had been ratified, Senator Wilson introduced a bill which would have invalidated all laws in the former Rebel states which discriminated against persons as to Civil rights on the basis of color, in which would have made it a misdemeanor to an act or enforce such a statute.[6] On the same day, Senator Trumbull said with regard to Senator Wilson's proposal:

> "The bill does not go far enough, if what we have been told today in regard to the treatment of freedmen in the Southern States is true. . . . '[U]ntil [the Thirteenth Amendment] is adopted, there may be some question . . . as to the authority of Congress to pass such a bill as this, but after the adoption of the constitutional amendment, there can be none.'
> "The second clause of that amendment was inserted for some purpose, and I would like to know . . . for what purpose? Sir, for the purpose, and none other, of preventing State Legislatures from enslaving, under any pretense, those whom the first clause declared should be free."[7]

Senator Trumbull then indicated that he would introduce separate bills to enlarge the powers of the recently founded Freedmens' Bureau and to secure the freedmen in their civil rights, both bills in his view being authorized by the second clause of the Thirteenth Amendment.[8]

On January 5, Senator Trumbull introduced both the freedmens' bill and the civil rights bill.[9] The civil rights bill was debated intermittently in the Senate on January 12, 1866 until its eventual passage over the President's veto on April 6. In the course of the debates, Senators

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[6] Cong. Globe, 39th Cong., 1st Sess., 39-42.

[7] Id. at 43.

[8] See ibid.

[9] Cong. Globe, 39th Cong., 1st Sess., 129.

Trumbull, who was by far the leading spokesman for the bill, made a number of statements which can only be taken to mean that the bill was aimed at "state action" alone.[10]

Among said statements is one made on January 29, 1866, in which Senator Trumbull cited a number of recently enacted Southern laws depriving men of rights named in the bill. He stated that "[t]he purpose of the bill under consideration is to destroy all these discriminations, and carry into effect the Constitutional Amendment."[11] On the same date, he further stated that "[This bill] may be assailed as drawing to the Federal Government powers that properly belong to "states"; but I apprehend, rightly considered, it is not obnoxious to that objection. It will have no operation in any state where the laws are equal, where all persons have the same civil rights without regard to color or race. It will have no operation in the state of Kentucky, when her slave code and all her laws discriminating between persons on account of race or color shall be abolished."[12] And yet on another occasion, Senator Trumbull stated "[i]f an offense is committed against a colored person simply because he is colored, in a state where the law affords him the same protection as if he were white, this act neither has, nor was, intended to have anything to do with his case because he has adequate remedies in the state court; but if he is discriminated against under color of state law because he is colored, then it becomes necessary to interfere for his protection."[13]

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[10] **Jones v. Alfred H. Mayer Co.**, 392 U. S. 409, 456, 88 S. Ct. 2186, 2212, 20 L. Ed. 1189 (1968) (Mr. Justice Harlan's dissenting opinion).

[11] Cong. Globe, 39th Cong., 1st Sess. 474.

[12] Id., at 476.

[13] Id., at 1785.

The legislative history subsequent to the passage of the 1866 Act further supports the assertion that state action is required as that history identifies the Civil Rights Act of 1866 with the Fourteenth Amendment which requires state action, as it is known that one of the major reasons for the enactment of the Fourteenth Amendment was to insure the constitutionality of the 1866 Act.[14] Furthermore, subsequent to the passage of the Fourteenth Amendment, Congress reenacted the Civil Rights Act of 1866 in Section 18 of the Act of 1870. Since Congress does not usually reenact one of its own statutes, it is logical to assume that they did so in order to insure the constitutionality of the 1866 Act under the Fourteenth Amendment, thereby, even more identifying the Act of 1866 with state action.

Not only does the legislative history indicate that state action is necessary in order to have a cause of action under § 1981, the decisions of the United States Supreme Court also foster the same conclusion. In the **Civil Rights Cases**, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835, decided less than two decades after the enactment of the Civil Rights Act of 1866, the court said in dictum of the 1866 Act:

> "This law is clearly corrective in its character, intended to counteract and furnish redress against state laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified."

In the case of **Hurd v. Hodge**, 334 U. S. 24, 68 S. Ct. 847, 92 L. Ed. 1187, and **Corrigan v. Buckley**, 271 U. S. 323, 46

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[14] Biddle, **Civil Rights and the Federal Law, Safeguarding Civil Liberties Today**, 116, 117, 120-122 (1949); M. Konvitz, **A Century of Civil Rights**, 49-50 (1961); Kelly and Harbison, **The American Constitution**, third edition, 461, wherein the authors state concerning the working of the 14th Amendment, "These provisions, largely the work of Representative John A. Bingham of Ohio, were intended to remove all doubt as to the constitutionality of the Civil Rights Act, as Stevens presently makes clear in debate."

S. Ct. 521, 70 L. Ed. 969, the Supreme Court held in regard to the Civil Rights Act of 1866 that "the action towards which the provisions of the statute under consideration is [sic] directed is governmental action."

Even assuming that § 1981 was enacted to prevent private discrimination, it was clearly designed not to prohibit a white employer from refusing to hire a black or from discharging that black, but on the other hand to prevent the white employer from merely imposing another form of slavery on the black. Without the right to contract, the black would find it difficult to resist this other form of tutelage.[15]

Just as the history of a hundred years ago indicates that § 1981 was clearly not meant to prohibit private discrimination in employment, modern history, both of the Supreme Court and the Congress does likewise. For example, in **Colorado Anti-Discrimination Commission v. Continental Airlines, Inc.**, 372 U. S. 714 (1963), the Supreme Court was confronted with the question of whether a Colorado statute prohibiting private discrimination in employment had been preempted by previous federal action in the same field, the court reviewed numerous statutes and the Executive Orders of Presidents of the United States, but nowhere did it consider or suggest that private discrimination in employment had comprehensively been rendered unlawful by provision of a statute passed in 1966. In fact, it did not even refer to the Civil Rights Act of 1866 in the decision. In another decision, **Steele v. Louisville & N. R. R.**, 323 U. S. 192 (1944), the Supreme

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[15] "It is, indeed, not probable that a general attempt will be made to restore slavery in its old form, on account of the barriers which such an attempt will find in its way; but there are systems intermediate between slavery as it formerly existed in the south, and free labor as it exists in the north, but more nearly related to the former than to the latter, the introduction of which will be attempted." Report of Carl Schurz, S. Exec. Doc. No. 2, 39th Congress, 1st Sess. at 21 (1865).

Court went to great lengths to infer from the Railway Labor Act[16] an obligation upon unions to refrain from invidious discrimination on account of race and carry forth their obligation as exclusive bargaining representatives for employees. None of this would have been necessary had the court been able to rely upon § 1981. However, it did not rely upon said Section and petitioner contends that this was because said Section would have been of no avail to the court.

During the Congressional debates on Title VII of the Civil Rights Act of 1964, there was no hint that the Civil Rights Act of 1866 had already rendered private discrimination in employment unlawful and actionable in the federal courts. "For example, the leading proponents of Title VII submitted legal opinion from distinguished American constitutional lawyers, including the Deputy Attorney General, a wide range of private practitioners and law teachers, the Office of the Solicitor of Labor and the Bar Association of the City of New York . . . Not one of these authorities suggest that the apparently serious consideration given to the question of the constitutionality of the proposed Title VII was simply a charade in light of the fact the substitive prohibitions of that Title had been a part of the law of the United States since a year after the close of hostilities in the Civil War. . . ."

"One of the leading scholarly authorities on the subject of equal or fair employment and what is perhaps a leading treatise on the subject, states the following view as to the position of Title VII in the regulation of employment discrimination:

> 'Equal employment opportunity measures have taken many forms, including, most recently, a federal statute. Title VII of the Civil Rights Act of 1964 is the

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[16] 45 U. S. C., § 151 et seq.

first comprehensive equal employment opportunity law ever passed by Congress. . . .'

"Second, and as the product of the lengthy consideration and debate just described, the Congress enacted a statute which is in its own terms perspective in application . . . this further manifests the novelty of the legislation." **Smith v. North American Rockwell Corporation,** *supra.*

Petitioner contends that the recent case of **Jones v. Alfred H. Mayer,** *supra*, does not change the requirement of state action, as there is difference in the wording of § 1981 involved herein and § 1982 involved in the **Jones** case. Furthermore, three employment contract cases decided subsequent to **Jones** have decided that state action is still required under § 1981.[17]

II

Assuming *arguendo* that § 1981 applies to private discrimination in employment, one is then confronted with the question of what effect Title VII of the Civil Rights Act of 1964 has upon § 1981. Petitioner contends that Title VII has repealed by implication § 1981. Whereas, § 1981 is general in its terms, Title VII is explicitly specific. Under general principles of statutory interpretation, specific legislation "will prevail over general language of the same or another statute which might otherwise prove controlling."[18]

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[17] **Colbert v. H-K Corporation,** *supra*; **Kendrick v. American Bakery Co.,** *supra*; **Norman v. Missouri Pacific R. R.,** *supra.*

[18] **Kepner v. United States,** 195 U. S. 100 (1904); **Bulova Watch Co. v. United States,** 365 U. S. 753 (1961); **Fourco Glass Co. v. Transmirra Prods. Corp.,** 353 U. S. 222 (1957); **Virginian Rwy. v. System Federation,** 300 U. S. 515 (1937); **Gallishan v. United States,** 285 U. S. 515 (1932); **Ginsberg & Sons, Inc. v. Popkin,** 285 U. S. 204 (1932).

Where the provisions in two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one.[19] Thus, one must examine § 1981 and Title VII extensively and determine whether or not there is irreconcilable conflict. Whereas § 1981 is very general and broad, Title VII is an extensive and comprehensive attempt to deal with the problem of equal employment opportunity. Title VII applies not only to employers, but also to employment agencies, labor unions, and joint labor-management committees which control apprenticeship or other training programs. It is aimed at employment discrimination based not only upon race or color but also on religion, sex, or national origin. § 703, 42 U. S. C., § 2000e-2. The act creates the Equal Employment Opportunity Commission and directs it to receive, investigate and conciliate charges of discrimination in employment. §§ 705, 706 (a), 42 U. S. C., §§ 2000e-4, 2000e-5 (a). Where the alleged discrimination occurs in a state or city which has its own equal employment law, the EEOC normally may not take jurisdiction over a complaint until the state or local agency has had an opportunity to act. § 706 (b), (c), 42 U. S. C., § 2000e-5 (b), (c). If the EEOC is unable to secure voluntary compliance, it must notify the complainant, who may then file suit within thirty days in a federal district court. § 706 (e), 42 U. S. C., § 2000e-5 (e).

"[Thus], the statute provides administrative investigation, conciliation and enforcement, as well as litigation in the United States District Court, in an elaborate structure of procedures which evidences a statutory purpose favoring administrative investigation and conciliation—not merely litigation. This statutory purpose and the complicated combination of administrative action and litigation have both received wide spread judicial recog-

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[19] **Posadas v. National City Bank**, 296 U. S. 497, 503 (1936).

nition and approval . . . construction of 42 U. S. C., § 1981 as a jurisdictional basis for judicial decision in this complicated area of employment practices would be an insupportable avoidance of the evident purpose and meaning of Title VII of the Civil Rights Act of 1964 and particularly of the elaborate administrative and litigative machinery provided thereunder." **Smith v. North American Rockwell Corporation,** *supra.*

Where Title VII is specific, § 1981 is general in its terms and applicability. Where Title VII sets forth a twentieth century structure of administrative machinery and procedures with administrative investigation and conciliation being favored over court litigation, § 1981 provides direct access to the courts. Where Title VII has a thirty day statute of limitations, § 1981 has the longer state statute of limitations. Where Title VII has exclusions and exemptions, §1981 has none. From even a cursory examination of the two statutes, one is confronted with many conflicts both in the policy area and the procedural area of the two statutes. From a purely legal standpoint, Petitioner submits that Title VII has by implication, repealed § 1981. However, Petitioner contends that § 1981 should be laid to rest also, from a purely practical standpoint. As stated by Chief Judge Barrow in **Smith v. North American Rockwell Corporation,** *supra,* ". . . unless the 1866 statute is eliminated from this case, litigation thereunder would require this court to formulate an applicable period of limitations for causes of action, appropriate rules governing the scope of remedies, and standards of relevance for discovering proceedings and for defining the issues to be litigated. No guides to any such proposed judicial tasks have been developed in the more than 100 years of the existence of 42 U. S. C., § 1981 in its current and predecessor forms."

To do as the United States Court of Appeals for the Fifth Circuit has done in the instant case, is to say that

the extensive and commendable work Congress did in passing Title VII was in large part a complete waste of time. It is to say that the effort to provide a practical method by which discrimination in employment can be rectified through an administrative agency which can rely on its expertise in the area and proceed through the conciliation method as opposed to court litigation, has been nullified. Surely, this is not the Congressional intent. The final problem this court is to resolve is whether, assuming that Title VII has not repealed § 1981, what effect has it had upon that statute. Is it as the United States Court of Appeals for the Fifth Circuit has said—that the two statutes must remain viable, side by side, with the alleged discriminatee having a choice as to which remedy he wishes to pursue? Thus, allowing him to either choose Title VII or on the other hand, § 1981 or as Mrs. Sanders did in the instant case, follow the Title VII route and then switch over to the § 1981 route? Or is it to be as the United States Court of Appeals for the Seventh Circuit has held —that one cannot be allowed to intentionally bypass the Equal Employment Opportunity Commission without good reason. **Waters v. Wisconsin Steel Works**, *supra*. At the very least, this court should require as did the Seventh Circuit, that an aggrieved person be required to follow Title VII unless they have good reason for not doing such. In the instant case, the Plaintiff followed Title VII up until the time she realized that her suit in Federal District Court could not lie under that act because of the thirty-day statute of limitations. At that point, she changed over to § 1981 undoubtedly assuming that a different statute of limitations would apply. She has shown no good reason why she could not have filed suit within the thirty-day statute of limitations under Title VII and, therefore, under the **Waters** case, would not be able to maintain her action.

It is because of the questions of whether § 1981 prohibits private discrimination in employment and, if so,

what effect Title VII has had upon that section as well as the questions of what impact the **Jones,** *supra* decision of this court has had upon this area, plus the diversity of judicial opinion precipitated by these questions and the the differences in the opinions of the Fifth and Seventh Circuits that this court should grant this petition for certiorari and lay to rest these questions once and for all.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted

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December 9, 1970

what effect Title VII has had upon that section as well as the questions of what impact the Jones, supra decision of this court has had upon this area, plus the diversity of judicial opinion precipitated by these questions and the the differences in the opinions of the Fifth and Seventh Circuits that this court should grant this petition for certiorari and lay to rest these questions here and for all.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States District Court
Northern District of Georgia
Atlanta Division

Mrs. Fannie M. Sanders
vs.
Dobbs Houses, Inc.

Civil Action
No. 12842

Order

This is an action for injunctive relief under the Equal Employment Opportunity subchapter of the Civil Rights Act of 1964 arising out of defendant's allegedly discriminatory employment practices. Jurisdiction is alleged under 28 U. S. C., § 1343.

The complaint as filed on June 27, 1969, attempted to set forth a claim arising under 42 U. S. C., § 2000e, et seq., by alleging that plaintiff, a Negro, was falsely accused of theft, threatened with criminal prosecution, and then fired, all in violation of the Equal Employment Opportunity Act. The complaint shows that plaintiff filed a complaint with the EEOC on March 5, 1968, and that on May 12, 1969, 46 days before the instant action was filed, the EEOC notified plaintiff that conciliation efforts had failed. On July 22, 1969, defendant filed a motion to dismiss on the ground that a civil action under § 2000e is forever barred if not filed within 30 days after the Commission notifies the aggrieved party that voluntary compliance has not been obtained. One month later, on September 2, 1969, a proposed amendment to the complaint was allowed filed subject to objections. In the amendment plaintiff attempted to set forth a claim under 42 U. S. C., §§ 1981, 1982, and 1983, with jurisdiction of the claim allegedly being present under § 1981. The case is now before the court for con-

sideration of defendant's motion to dismiss and defendant's objections to the amendment to the complaint.

Defendant has moved to dismiss the complaint as originally filed for failure to state a claim or for lack of jurisdiction over the subject matter in that the complaint was not filed within the 30-day period provided by § 2000e-5(e). Plaintiff, on the other hand, contends that the time limits provided by the statute are directory rather than mandatory. Although that is the accepted view with regard to the provision that any civil action must be filed within 90 days after a complaint is lodged with the EEOC (for under any other interpretation the plaintiff might well be penalized for the Commission's delay[1]) the courts which have dealt with similar contentions regarding the 30-day provision here in question have uniformly held that a civil action may not be filed more than 30 days after the Commission has notified the aggrieved party that conciliation efforts have failed. *E. g.*, **King v. Georgia Power Co.**, 295 F. Supp. 943 (N. D. Ga. 1968); **Monday v. Crown Zellerbach Corp.**, 271 F. Supp. 258 (E. D. La. 1967). **See, also, Kavanagh v. Nobel**, 332 U. S. 535 (1947). The motion to dismiss therefore will be granted.

As to the amended complaint which was allowed filed subject to objections, the court notes that the claim which plaintiff seeks to raise is one for damages under 42 U. S. C., §§ 1981, 1982, 1983. However, the damage claim plaintiff attempts to set forth in the amendment clearly is not authorized by § 1981 (which provides that citizens of all races shall enjoy equal benefits under the laws in every state[2]) or by § 1982 (which provides that citizens

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[1] Dent v. St. Louis-San Francisco Ry., 265 F. Supp. 56 (N. D. Ala. 1967).

[2] Furthermore, § 1981 does not provide a civil cause of action for damages. Watson v. Devlin, 167 F. Supp. 638 (E. D. Mich. 1958).

of all races shall enjoy equal rights to acquire and dispose of real and personal property). **See** *e. g.*, **Jones v. Mayer Co.**, 392 U. S. 409 (1968); **Spenger v. United States**, 167 F. Supp. 641 (N. D. Calif. 1958). Furthermore, in order to have a claim under § 1983 the discriminatory acts must have been done under color of state law, *i. e.*, by a state official, or by one acting in concert with such official, in abuse of his authority. Since plaintiff has alleged nothing to bring herself within the provision of any of these statutes, it would be futile to allow the amendment filed. **See Foman v. Davis**, 371 U. S. 178 (1962). As Professor Moore has pointed out:

> "If a complaint . . . as amended, would be subject to a motion to dismiss under Rule 12(b)(6) or to a motion to strike under Rule 12(f), as the case may be, it would be an idle move for the court to allow such amendment over the objection of the opposing party who, if correct, has merely to make a formal motion to dismiss or to strike after leave to amend is granted." 3 Moore, **Federal Practice**, ¶ 15.08[4] at 904.

Accordingly, defendant's motion to dismiss the complaint as originally filed is GRANTED; defendant's objections to the amendment to the complaint are SUSTAINED and the order allowing the amendment filed subject to objection is VACATED.

It Is So Ordered.

This 20 day of October, 1969.

/s/ Newell Edenfield
Newell Edenfield
United States District Judge

APPENDIX B

In the
United States Court of Appeals
For the Fifth Circuit

No. 29029

Mrs. Fannie M. Sanders,
Plaintiff-Appellant,

versus

Dobbs Houses, Inc.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

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(August 28, 1970)

Before Tuttle, Dyer and Clark, Circuit Judges.

Clark, Circuit Judge: In 1968, the Supreme Court resurrected § 1 of the Civil Rights Act of 1866 [now 42 U. S. C. A., §§ 1981 and 1982 (1970)] and held the portion of the original act which now appears as 42 U. S. C. A., § 1982, barred racial discrimination by private individuals in the sale or rental of property.[1] The quickening

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[1] Jones v. Alfred H. Mayer Co., 392 U. S. 409, 88 S. Ct. 2186, 20 L. Ed. 2d 1189 (1968). The Court agreed with the Attorney General of the United States, who in oral argument asserted:

> "The fact that the statute lay partially dormant for many years cannot be held to diminish its force today." 392 U. S. at 437.

of this statutory Lazarus necessarily revived the congressional prohibition against purely private racial discrimination in contracts of employment. This prohibition against private discriminatory practices, now codified as 42 U. S. C. A., § 1981, had laid dormant in a tomb of disuse for over a century. Because the district court failed to accord § 1981 its new viability, which permits the maintenance of actions arising out of purely private relationships, we reverse.

Plaintiff, Mrs. Fannie M. Sanders, was discharged by her employer, Dobbs Houses, Inc. (Dobbs), the defendant, for stealing food. On March 5, 1968, she formally complained to the Equal Employment Opportunity Commission (EEOC) pursuant to Title VII of the Civil Rights Act of 1964,[2] that the charges against her had been false and that she was discharged solely because she was a Negro. On May 12, 1969, the EEOC notified plaintiff that it had been unable to obtain voluntary conciliation and advised her that she had thirty days to commence a civil action. Forty-six days later she instituted this action for an injunction, back pay and an offer of reinstatement under Title VII. Dobbs moved the court to dismiss the complaint for failure to meet the thirty-day statute of limitations.[3] Plaintiff thereupon moved the court for leave to amend her complaint to state jurisdiction under 42 U. S. C. A., § 1981, and to allege that white employers in Georgia had the custom and practice of firing Negro employees after falsely accusing them of theft. The trial judge allowed the amendment, subject to objection, but dismissed the amended complaint on the grounds that the statute of limitations barred the Title VII action and the § 1981 claim could not be maintained against a private employer in the absence of some element of State action.

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[2] 42 U. S. C. A., § 2000e—5 (1970).

[3] U. S. C. A., § 2000e—5(e) (1970).

Our finding that the complaint stated a claim on which relief could be granted may be most succinctly expounded by answering three well-defined dispositive questions:

1. Can a plaintiff state a claim against a private employer under 42 U. S. C. A., § 1981?

2. Do the specific remedies fashioned by Congress in Title VII of the Civil Rights Act of 1964 preempt the general remedial language of 42 U. S. C. A., § 1981?

3. Are damages recoverable under 42 U. S. C. A., § 1981?

1. Rights Against a Private Employer Under 1981.

In **Waters v. Wisconsin Steel Works**, ... F. 2d ... (7th Cir. [No. 17895, April 28, 1970]), the Seventh Circuit recently held that § 1981[4] prohibits "private racial discrimination in employment by companies and unions." Such a conclusion was clearly forecast by the Supreme Court's opinion in **Jones v. Alfred Mayer Co.**, *supra*, n. 1. In **Jones** the Court held that 42 U. S. C. A., § 1982[5] prohibited "**all** racial discrimination, private as well as public, in the sale or rental of property. . . ." The Seventh Circuit reasoned that since § 1981 and § 1982 are both

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[4] § 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory **to make and enforce contracts**, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other (emphasis supplied).

[5] § 1982 provides:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

derived from § 1 of the Civil Rights Act of 1866,[6] they must be construed consistently and that since § 1982 is enforceable against private entities, § 1981 is similarly enforceable. We agree.

The contentions of Dobbs to the contrary are without merit. First, it argues that problems arising out of the Civil Rights Act have been associated with the Fourteenth Amendment of the Constitution of the United States,[7] which would demand State action as a prerequisite to jurisdiction. This argument was devitalized in **Jones** where the Court stated:

> "It is quite true that some members of Congress supported the Fourteenth Amendment 'in order to eliminate doubt as to the constitutional validity of

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[6] Section 1 of the Civil Rights Act of 1866 provided:

> **Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,** That all persons born in the United States and not subject to any foreign power, . . . are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

[7] Subsequent to oral argument in this case, the Supreme Court decided Adickes v. S. H. Kress & Co., . . . U. S. . . . , 90 S. Ct. 1598, . . . L. Ed. 2d . . . (1970). Because the case distinguished **Jones** and found a prerequisite of State action, we requested additional comments from counsel of both parties to this suit. From our examination of this opinion and these comments, it is clear that **Adickes** only dealt with an action based upon 42 U. S. C. A., § 1983 and that the mutual genesis of §§ 1981 and 1982 was chronologically and conceptionally separated from § 1983.

> the Civil Rights Act as applied to the States.' Hurd v. Hodge, 334 U. S. 24, 32-33, 68 S. Ct. 847, 852. But it certainly does not follow that the adoption of the Fourteenth Amendment or the subsequent re-adoption of the Civil Rights Act were meant somehow to **limit** its application to state action."
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> 392 U. S. at 436, 88 S. Ct. at 2201.

The second contention of Dobbs—that **Jones** is distinguishable since it was foreshadowed by a long line of cases forbidding racial discrimination in the sale of real property—is equally without merit. The defendants in **Waters** made the same unfounded contention, provoking the following judicial reply: "If, by foreshadowing, the defendants mean that the State action concept has sometimes been employed in a flexible fashion to achieve just results, the cases upon which they rely foreshadow the demise of the requirement of State action under § 1981 as well. Furthermore, it is mistaken to suggest that courts have not used similar means to circumvent the requirement of State action in the area of employment contracts: **See Steele v. Louisville & Nashville R. R. Co.**, 323 U. S. 192, 198-99 (1944)." ...F. 2d ... [Slip at 10]. We would only note further that defendant's concern that this decision is unprecedented is much too myopic. The result in this case is both predicted and required by **Jones.**

II. Preemption: Repeal by Implication.

Dobbs vigorously contends that Title VII of the Civil Rights Act of 1964 preempted the general remedial language of 42 U. S. C. A., § 1981, so that a cause of action can no longer exist thereunder. Since there is no language in Title VII that can remotely be construed as directly repealing § 1981, the only means of repeal through preemption would be by implication. Repeals by implication, however, are not favored and "the intention of

the legislature must be clear and manifest. . . ." **Posadas v. National City Bank**, 296 U. S. 497, 503, 56 S. Ct. 349, 80 L. Ed. 351 (1936). **See, e. g., Silver v. New York Stock Exchange**, 373 U. S. 341, 83 S. Ct. 1246, 10 L. Ed. 2d 389 (1963).

In **Waters** the Seventh Circuit was faced with the same contention and held that "a right to sue under § 1981 for 'private' racial discrimination in employment existed prior to 1964. By enacting Title VII of the 1964 Civil Rights Act, Congress did not repeal this right to sue." ... F. 2d at ... [Slip at 5]. This interpretation also finds support by analogy in **Jones** where the Court ruled that Title VIII of the Civil Rights Act of 1968 did not repeal § 1982 by implication. Moreover, in **Sullivan v. Little Hunting Park, Inc.**, 396 U. S. 229, ..., 90 S. Ct. 400, 405, ... L. Ed. 2d ..., ... (1970), the Court stated:

> "We noted in Jones v. Alfred H. Mayer Co., that the Fair Housing Act of 1968, 82 Stat. 81, in no way impaired the sanction of § 1982. 392 U. S. at 413-417, 88 S. Ct. at 2189-2192. What we said there is adequate to dispose of the suggestion that the Public Accommodations provision of the Civil Rights Act of 1964, 78 Stat. 243, in some way supersedes the provisions of the 1866 Act. For the hierarchy of administrative machinery provided by the 1964 Act is not at war with the principles embodied in § 1982."

So too, the equal employment provisions of the same Civil Rights Act of 1964 do not supersede the provisions of § 1981, which had its origins in the very same section of the Civil Rights Act of 1866 as did § 1982. Consistent with this reasoning, we have previously held that the enactment of Title VII did not repeal redundant remedies before the National Labor Relations Board.[8]

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[8] Local 12, Rubber Workers v. NLRB, 368 F. 2d 12 (1966).

Furthermore, occurrences within the Congress culminating in the passage of Title VII strongly support the conclusion that it was not intended to supersede existing remedies. Congress rejected by more than a two-to-one margin Senator Tower's amendment that would have made Title VII the exclusive federal remedy for employment discrimination.[9]

Thus we conclude that the specific remedies fashioned by Congress in Title VII were not intended to preempt the general remedial language of § 1981. Dobbs has not complained of any specific area of irreconcilable conflict between the laws. The wide time differences provided by the statute of limitations applicable to actions under the two acts are not irreconcilable when the detailed time-consuming investigatory and conciliatory procedures to be pursued by EEOC are considered. **See Waters v. Wisconsin Steel Works**, *supra*, at ... [Slip at 17].

III. Relief Under 1981: A Right Without a Remedy?

This question is most readily answered by reference to this Court's recent opinion in **Mizell v. North Broward Hospital District**, ... F. 2d ... (5th Cir. 1970) [No. 27488, March 25, 1970], which reversed a trial court holding that a damage suit cannot be predicated upon § 1981 with the following rationale:

> "**Jones v. Mayer**, of course, dealt with section 1982, which, so far as is here pertinent, is precisely like 1981 in that it makes no provision for 'civil damages or any other form of civil relief.' . . . We can see no conceivable difference between the language of Section 1982 and Section 1981 that would justify our affirming the decision by the trial court here that 'a damage suit cannot be predicated upon Section 1981.'

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[9] 110 Cong. Rec. 13650-52 (1964).

Nor, for that matter, can it be held that there is no right to injunctive relief."

See Sullivan v. Little Hunting Park, Inc., *supra*.

The amended complaint stated a cause of action sufficient to withstand the motion to dismiss.

Reversed and remanded.

APPENDIX C

In the
United States Court of Appeals
For the Fifth Circuit

No. 29029

Mrs. Fannie M. Sanders,
Plaintiff-Appellant,

versus

Dobbs Houses, Inc.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

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On Petition for Rehearing and Petition for Rehearing En Banc
(Opinion Aug. 28, 1970, 5 Cir., 1970, ... F.2d ....).

(October 26, 1970)

Before Tuttle, Dyer and Clark,
Circuit Judges

Per Curiam: The Petition for Rehearing is Denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12), the Petition for Rehearing En Banc is Denied.

APPENDIX D

United States Court of Appeals
For the Fifth Circuit

October Term, 1969

No. 29029

D. C. Docket No. CA 12842
Mrs. Fannie M. Sanders,
Plaintiff-Appellant,

versus

Dobbs Houses, Inc.,
Defendant-Appellee.

Appeal from the United States District Court for the
Northern District of Georgia
Before Tuttle, Dyer and Clark, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

It is further ordered that defendant-appellee pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

August 28, 1970

Issued as Mandate:

APPENDIX E

Civil Rights Act of 1964

Pub. L. No. 88-352, 88th Cong., 1st Sess., 1964, 78 Stat. 241, 253-66; U.S.C. §§ 1971, 2000e—2000e-15; F.C.A. 42 §§ 1971, 2000e—2000e-15

Title VII—Equal Employment Opportunity Definitions

Sec. 701. For the purposes of this title—

(a) The term "person" includes one or more individuals, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or a State or political subdivision thereof, (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954: **Provided**, That during the first year after the effective date prescribed in subsection (a) of section 716, persons having fewer than one hundred employees (and their agents) shall not be considered employers, and, during the second year after such date, persons having fewer than seventy-five employees (and their agents) shall not be considered employers, and, during the third year after such date, persons having fewer than fifty employees (and their agents) shall not be considered employers: **Provided further**, That it shall be the policy of the

United States to insure equal employment opportunities for Federal employees without discrimination because of race, color, religion, sex or national origin and the President shall utilize his existing authority to effectuate this policy.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person; but shall not include an agency of the United States, or an agency of a State or political subdivision of a State, except that such term shall include the United States Employment Service and the system of State and local employment services receiving Federal assistance.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plans so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employee opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor or-

ganization) is (A) one hundred or more during the first year after the effective date prescribed in subsection (a) of section 716, (B) seventy-five or more during the second year after such date or fifty or more during the third year, or (C) twenty-five or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

Exemption

Sec. 702. This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution.

Discrimination Because of Race, Color, Religion, Sex, or National Origin

Sec. 703. (a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Nothwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona-fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propogation of a particular religion.

(f) As used in this title, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization,

joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful

employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

(i) Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Other Unlawful Employment Practices

Sec. 704. (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

(b) It shall be an unlawful employment practice for an employer, labor organization, or employment agency to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisment may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

Equal Employment Opportunity Commission

Sec. 705. (a) There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party, who shall be appointed by the President by and with the advice and consent of the Senate.

* * * * * * *

(f) The principal office of the Commission shall be in or near the District of Columbia, but it may meet or exercise

any or all of its powers at any other place. The Commission may establish such regional or State offices as it deems necessary to accomplish the purpose of this title.

(g) The Commission shall have power—

(1) to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals;

(2) to pay to witnesses whose depositions are taken or who are summoned before the Commission or any of its agents the same witness and mileage fees as are paid to witnesses in the courts of the United States;

(3) to furnish to persons subject to this title such technical assistance as they may request to further their compliance with this title or an order issued thereunder;

(4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them refuse or threaten to refuse to cooperate in effectuating the provisions of this title, to assist in such effectuation by conciliation or such other remedial action as is provided by this title;

(5) to make such technical studies as are appropriate to effectuate the purposes and policies of this title and to make the results of such studies available to the public;

(6) to refer matters to the Attorney General with recommendations for intervention in a civil action brought by an aggrieved party under section 706, or for the institution of a civil action by the Attorney General under section 707, and to advise, consult, and assist the Attorney General on such matters.

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Prevention of Unlawful Employment Practices

Sec. 706. (a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this title has occurred (and such charge sets forth the facts upon which it is based) that employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization (hereinafter referred to as the "respondent") with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding. Any officer or employee of the Commission, who shall make public in any manner whatever any information in violation of this subsection shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than one year.

(b) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after pro-

ceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State or local authority.

(c) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State, which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(d) A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b), such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiv-

ing notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier and a copy of such charge shall be filed by the Commission with the State or local agency.

(e) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this title, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (b) or the efforts of the Commission to obtain voluntary compliance.

(f) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this title. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the

judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the plaintiff would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28 of the United States Code, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 704(a).

(h) The provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes,"

approved March 23, 1932 (29 U. S. C. 101-115), shall not apply with respect to civil actions brought under this section.

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in civil action brought under subsection (e), the Commission may commence proceedings to compel compliance with such order.

(j) Any civil action brought under subsection (e) and any proceedings brought under subsection (i) shall be subject to appeal as provided in sections 1291 and 1292, title 28, United States Code.

(k) In any action or proceeding under this title the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Sec. 707. (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) The district courts of the United States shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, and in any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

Effect on State Laws

Sec. 708. Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

Investigations, Inspections, Records, State Agencies

Sec. 709. (a) In connection with any investigation of a charge filed under section 706, the Commission or its designated representative shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices covered by this title and is relevant to the charge under investigation.

(b) The Commission may cooperate with State and local agencies charged with the administration of State fair employment practices laws, and, with the consent of such agencies, may for the purpose of carrying out its functions and duties under this title and within the limitation of funds appropriated specifically for such purpose, utilize the services of such agencies and their employees and, notwithstanding any other provision of law, may reimburse such agencies and their employees for services rendered to assist the Commission in carrying out this title. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such State or local

agencies and such agreements may include provisions under which the Commission shall refrain from processing a charge in any cases or class of cases specified in such agreements and under which no person may bring a civil action under section 706 in any cases or class of cases so specified, or under which the Commission shall relieve any person or class of persons in such State or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this title.

(c) Except as provided in subsection (d), every employer, employment agency, and labor organization subject to this title shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom, as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this title or the regulations or orders thereunder. The Commission shall, by regulation, require each employer, labor organization, and joint labor-management committee subject to this title which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purpose of this title, including, but not limited to, a list of applicants who wish to participate in such program, including the chronological order in which such applications were received, and shall furnish to the Commission, upon request, a detailed description of the manner in which persons are selected to participate in the apprenticeship or other training program. Any employer, employment agency, labor organization, or joint labor-management committee which believes that the application to it of any regulation or order issued under this section would result in undue hardship may (1) apply to the Com-

mission for an exemption from the application of such regulation or order, or (2) bring a civil action in the United States district court for the district where such records are kept. If the Commission or the court, as the case may be, finds that the application of the regulation or order to the employer, employment agency, or labor organization in question would impose an undue hardship, the Commission or the court, as the case may be, may grant appropriate relief.

(d) The provisions of subsection (c) shall not apply to any employer, employment agency, labor organization, or joint labor-management committee with respect to matters occurring in any State or political subdivision thereof which has a fair employment practice law during any period in which such employer, employment agency, labor organization, or joint labor-management committee is subject to such law, except that the Commission may require such notations on records which such employer, employment agency, labor organization, or joint labor-management committee keeps or is required to keep as are necessary because of differences in coverage or methods of enforcement between the State or local law and the provisions of this title. Where an employer is required by Executive Order 10925, issued March 6, 1961, or by any other Executive order prescribing fair employment practices for Government contractors and subcontractors, or by rules or regulations issued thereunder, to file reports relating to his employment practices with any Federal agency or committee, and he is substantially in compliance with such requirements, the Commission shall not require him to file additional reports pursuant to subsection (c) of this section.

(e) It shall be unlawful for any officer or employee of the Commission to make public in any manner whatever any information obtained by the Commission pursuant to its authority under this section prior to the institution of any proceeding under this title involving such information.

Any officer or employee of the Commission who shall make public in any manner whatever any information in violation of this subsection shall be guilty of a misdemeanor and upon conviction thereof, shall be fined not more than $1,000, or imprisoned not more than one year.

Investigatory Powers

SEC. 710. (a) For the purposes of any investigation of a charge filed under the authority contained in section 706, the Commission shall have authority to examine witnesses under oath and to require the production of documentary evidence relevant or material to the charge under investigation.

(b) If the respondent named in a charge filed under section 706 fails or refuses to comply with a demand of the Commission for permission to examine or to copy evidence in conformity with the provisions of section 709(a), or if any person required to comply with the provisions of section 709(c) or (d) fails or refuses to do so, or if any person fails or refuses to comply with a demand by the Commission to give testimony under oath, the United States district court for the district in which such person is found, resides, or transacts business, shall, upon application of the Commission, have jurisdiction to issue to such person an order requiring him to comply with the provisions of section 709(c) or (d) or to comply with the demand of the Commission, but the attendance of a witness may not be required outside the State where he is found, resides, or transacts business and the production of evidence may not be required outside the State where such evidence is kept.

(c) Within twenty days after the service upon any person charged under section 706 of a demand by the Commission for the production of documentary evidence or for permission to examine or to copy evidence in conformity with

the provisions of section 709(a), such person may file in the district court of the United States for the judicial district in which he resides, is found, or transacts business, and serve upon the Commission a petition for an order of such court modifying or setting aside such demand. The time allowed for compliance with the demand in whole or in part as deemed proper and ordered by the court shall not run during the pendency of such petition in the court. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of such demand to comply with the provisions of this title or with the limitations generally applicable to compulsory process or upon any constitutional or other legal right or privilege of such person. No objection which is not raised by such a petition may be urged in the defense to a proceeding initiated by the Commission under subsection (b) for enforcement of such a demand unless such proceeding is commenced by the Commission prior to the expiration of the twenty-day period, or unless the court determines that the defendant could not reasonably have been aware of the availability of such ground of objection.

(d) In any proceeding brought by the Commission under subsection (b), except as provided in subsection (e) of this section, the defendant may petition the court for an order modifying or setting aside the demand of the Commission.

Notices to Be Posted

Sec. 711. (a) Every employer, employment agency, and labor organization, as the case may be, shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts from or, summaries of, the pertinent provisions of this title and information pertinent to the filing of a complaint.

(b) A willful violation of this section shall be punishable by a fine of not more than $100 for each separate offense.

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Veterans' Preference

Sec. 712. Nothing contained in this title shall be construed to repeal or modify any Federal, State, territorial, or local law creating special rights or preference for veterans.

Rules and Regulations

Sec. 713. (a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this title. Regulations issued under this section shall be in conformity with the standards and limitations of the Administrative Procedure Act.

(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this title if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this title regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after

publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this title.

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SEC. 716. (a) This title shall become effective one year after the date of its enactment [July 2, 1964].

(b) Notwithstanding subsection (a), sections of this title other than sections 703, 704, 706, and 707 shall become effective immediately.

(c) The President shall, as soon as feasible after the enactment of this title, convene one or more conferences for the purpose of enabling the leaders of groups whose members will be affected by this title to become familiar with the rights afforded and obligations imposed by its provisions, and for the purpose of making plans which will result in the fair and effective administration of this title when all of its provisions become effective. The President shall invite the participation in such conference or conferences of (1) the members of the President's Committee on Equal Employment Opportunity, (2) the members of the Commission on Civil Rights, (3) representatives of State and local agencies engaged in furthering equal employment opportunity, (4) representatives of private agencies engaged in furthering equal employment opportunity, and (5) representatives of employers, labor organizations, and employment agencies who will be subject to this title.